

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 7160 OF 2016

Shankar Nanabhau Kadam .. Petitioner

Versus

Bhausahab Eknath Borhade and others .. Respondents

Shri Sanket S. Kulkarni, Advocate for the Petitioner.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 30TH JANUARY, 2023.

FINAL ORDER :

. By order of 05th July, 2016, this Court issued notice to the respondent No. 1, returnable on 26th July, 2016 and in addition permitted the petitioner to serve the respondent No. 1 privately by any legally acceptable mode and file affidavit along with tangible proof of service. The service affidavit filed by the petitioner on 30th July, 2016 merely states that the respondents have been served without annexing any proof of service and the affidavit of service is bereft of any details of the manner in which the service was effected.

2. On 05th August, 2016 upon the submission by the learned counsel for the petitioner that the respondent No. 1 has been served at the address which was given by the respondent No. 1 in the Trial Court and on the same address the respondent No. 1 has also been served privately, an ad-interim relief in terms prayer clause "D" of the petition was granted pending hearing and final disposal of the petition and further proceedings of R.C.S. No. 174 of 2008 came to be stayed. Thereafter from 2016

onwards the matter has been adjourned from time to time only for the purpose of either issuance of fresh notice to the respondent No. 1 or for the purpose of await notice. Such a situation cannot be countenanced as stay has been granted to the R.C.S. No. 174 of 2008 apparently without any effective notice being served upon the respondent No. 1.

3. Considering the office record, including the bailiff report, which shows that the respondent No. 1 is not residing at the given address , which is also endorsed by the Gram Panchayat Pimpalas, Tq. Rahata, Dist. Ahmednagar that since last 30 to 35 years, the respondent No. 1 is not residing in the village Pimpalas, it is surprising that such a situation was not brought to the notice of this Court and ad-interim stay to the Court proceedings of the year 2008 continued from time to time.

4. It appears from the certificate which is issued by the Gram Panchayat that the address which has been furnished by the plaintiff/respondent No. 1 in R.C.S. No. 174 of 2008 is an incorrect address, as a result of which considerable judicial and administrative time has been wasted in attempting to serve the respondent No. 1.

5. The Trial Court is directed to seek appropriate explanation from the respondent No. 1/plaintiff and submit a report to this Court.

6. The present petition is being heard in the absence of the Respondent No 1 for the reason that the proceeding of the year 2008 has been stayed by this Court and the respondent No. 1

who is the contesting respondent could not be served inspite of lapse of almost seven years.

7. The issue in this petition lies in narrow compass that the application of the petitioner who is original defendant No. 3 seeking to set aside no cross order came to be rejected. Affidavit of evidence of the respondent No. 1/plaintiff was filed on 03.02.2016, and the defendant No. 3 sought time for cross examination on 27.06.2016 which came to be rejected by the Trial Court. An application below Exhibit 185 came to be filed on the same day i. e. 27.06.2016 seeking some time as the petitioner intended to move the High Court against the order of no cross. On the same day i. e. 27.06.2016 the application came to be rejected by stating that the reasons given are not satisfactory and justifiable. A second application on the same day was again filed by the petitioner seeking adjournment of the proceedings as the order of no cross was intended to be challenged before this Court. The second application was also rejected by the Trial Court.

8. Heard Mr. Kulkarni, learned counsel appearing for the petitioner.

9. The application for setting aside no cross order has been dismissed by the Trial Court summarily and without taking into consideration the fact that the affidavit of evidence was filed on 03.02.2016 and the petitioner herein was defendant No. 3 and was therefore expecting to cross examine the respondent No. 1 after the cross examination of the plaintiff by the defendant Nos. 1 and 2. Immediately on 27.06.2016, two applications came to be

filed by the petitioner seeking to set aside no cross order, which is in my opinion could have been easily set aside and opportunity could have been granted to the petitioner to cross examine the witness. It is not as if the petitioner was prolonging the trial by making several applications seeking adjournment for cross examining the respondent No. 1.

10. Considering the cryptic manner in which the applications have been rejected, the interest of all the parties have been jeopardized in as much as since the year 2016 there has been no further progress in the suit of the year 2008.

11. It is in the interest of justice that the impugned order dated 27.06.2016 passed below Exhibit Nos. 185 and 186 is hereby quashed and set aside. The parties shall appear before the Trial Court on 15.02.2023. A copy of this order be furnished to the Trial Court by the Registry, who is directed to issue notices to the parties to the suit. The petitioner to conduct the cross examination of the respondent No. 1/plaintiff on 15.02.2023.

12. In the light of the above, writ petition stands allowed. No costs.

[SHARMILA U. DESHMUKH, J.]

bsb/Jan. 23